

**A. J. Schmidt Co., William A. Schmidt and Sons, Incorporated and Sheet Metal Workers International Association, Local Union #19, AFL-CIO, Petitioner. Case 4-RC-14929**

December 16, 1982

# DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objections to an election held on March 11, 1982,<sup>1</sup> and the Acting Regional Director's report recommending disposition of same. Having reviewed the record in light of the exceptions and briefs, the Board hereby adopts the Acting Regional Director's findings only to the extent consistent herewith.

We agree with the Acting Regional Director that the Employer engaged in objectionable conduct by requesting its employees to report harassment by union organizers. For the reasons set forth below, however, we do not agree with the Acting Regional Director's recommendation to overrule Petitioner's Objection (a), which alleges that the Employer threatened plant closure, job losses, and wage and benefit cuts if the Petitioner were certified as the employees' collective-bargaining representative.<sup>2</sup>

During the preelection period, the Employer distributed a letter to employees which stated:

We can only survive if we work together to remain competitive and productive. We believe outside intervention can only hurt our ability to do this as well as threaten job security. Can any of us afford to risk steady, secure employment for the half-made promises which, if instituted, would most certainly add us to the list of other fabricators who have gone out of business and whose employees are now looking for work?

<sup>1</sup> The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 41 for, and 55 against, the Petitioner; there were 5 challenged ballots, an insufficient number to affect the results.

<sup>2</sup> The Acting Regional Director, in sustaining the part of "other objectionable conduct" regarding alleged misrepresentation of the Board's processes, correctly applied the law in effect at the time of his decision. Since then the Board, in *Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital*, 264 NLRB 1094 (1982), has overruled *Formco, Inc.*, 233 NLRB 61 (1977), and has found misrepresentations of the Board's processes not to be objectionable. Accordingly, we overruling the portion of the "other objectionable conduct" concerning such misrepresentations.

Although Members Fanning and Jenkins disagree with the Board majority's overriding of *Formco*, they consider themselves to be administratively bound by the Board's decision in *Riveredge Hospital*. See their dissenting position therein.

The Employer also distributed to employees a flyer entitled "Job Security vs. Union Security" which read in part:

If you think a union can do anything to protect your job, speak to employees at Sun Ship, Scott Paper, Steller Manufacturing, J.C. Ayres, Ludwig Honold, or other unionized companies in Chester that have either gone out of business or laid off a large number of employees.

Finally, the Employer distributed to employees a leaflet labeled "Strikes" which contained the following paragraph:

Can any of us afford to gamble our employment, security or paycheck on something that may very possibly lead us down the exact same path as some of our competitors such as Ludwig-Honold, J.C. Ayres, Steller Manufacturing or even Sun Ship.

In the same literature, the Employer stated:

As long as we are able to control our prices and remain competitive in the market, we feel cutbacks can be kept to a minimum. Should we be forced to raise our rates beyond what the market will bear, our workload will continue to fall. We will not now nor will we ever dismiss a man for his political, religious, or moral beliefs.

The Acting Regional Director found that the Employer's literature constituted merely a prediction of the possible economic effects of increased costs due to higher wages and benefits rather than a threat that a union victory would automatically be followed by loss of jobs. He also noted that the Employer accompanied its prediction with an assurance that it would not discriminate against employees because of their beliefs. Accordingly, the Acting Regional Director recommended overruling the objection. We do not agree with this recommendation.

It is well established that an employer may predict to employees the effects it believes unionization would have so long as the prediction is carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control.<sup>3</sup> Here, however, the Employer's literature did not contain any demonstrable evidence to support its message that unionization caused other plants to either close or to lay off a large number of employees and that

<sup>3</sup> *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); and, e.g., *Photo-Sonics, Inc., International Marketing Corporation: Photo Digitizing System, Inc.*, 254 NLRB 567 (1981).

unionization of the Employer could lead to the same result. Further, although the Employer did not explicitly threaten job losses if the Petitioner won the election, its repeated emphasis on job security along with its constant reference to unionized companies that suffered economic hardships clearly raised the implication that such job losses were a virtual certainty if the Petitioner were vic-

torious. We, therefore, find that the Employer unlawfully threatened plant closure and job losses as a direct result of unionization. Accordingly, we sustain the Petitioner's Objection (a).<sup>4</sup>

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

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<sup>4</sup> See *Turner Shoe Company, Inc. and Carmen Athletic Industries, Inc.*, 249 NLRB 144 (1980).